

CONTRACTOR NON-DISCLOSURE AGREEMENTS

The purpose of this memorandum is to discuss the use of non-disclosure agreements by contractors when dealing with Government employees and support contractors. It will describe what these agreements are, how they are used and when it is appropriate for Government employees to sign these agreements.

Increasingly, particularly in the Research and Development community, Government personnel are being asked to sign documents called non-disclosure agreements before contractors will enter into discussions about their capabilities. The purpose of these agreements is to protect the contractor's trade secrets and proprietary data that may be revealed during the discussions. Government employees may also be requested to sign non-disclosure agreements in conjunction with plant visits where manufacturing processes are considered trade secrets.

Before signing such an agreement, Government employees should coordinate the request that a non-disclosure agreement be signed with legal counsel. Additionally, they must be prepared to abide by the terms and conditions of such a non-disclosure agreement. Government employees are bound by the Trade Secrets Act, which makes them subject to criminal penalties if they reveal a contractor's trade secrets or proprietary data. Furthermore, civil actions may be brought against the Government, its employees and support contractors and may result in monetary damages being assessed for violations of a non-disclosure agreement. The document the employee signs will be considered evidence of the fact that the data they received was considered proprietary and that they personally agreed not to reveal it.

When is it in the best interests of the Government for its employees to sign such a document? When such data cannot be obtained in any other way and the terms of the non-disclosure agreement are reasonable and appropriate under the circumstances.

What might be considered reasonable terms and conditions? The scope of the agreement should clearly be defined, that is, the information to be provided should clearly be specified and identified as being "proprietary." The standard of care deemed necessary to protect the disclosed information may be set forth in the agreement; however, it should be no more rigorous than the terms of a non-disclosure agreement used by the Government to protect similar information.

The term of the non-disclosure agreement should be identified; two years would be reasonable under most circumstances. It should be clearly stated that nothing in the agreement shall be construed as creating an obligation by either party to enter into a contract or other business relationship. The agreement should also state that it contains the entire understanding of the parties and that it supersedes all prior agreements.

Additionally, circumstances under which there would be no liability for the disclosure of information identified in the non-disclosure agreement should also be clearly specified. For example, a clause similar to the following could be used:

The Disclosing Party (the contractor) acknowledges that the Receiving Party (the Government employee) shall not be liable for the disclosure or use of information which: (i) is already known to the Receiving Party at the time of disclosure; (ii) becomes publicly known through no wrongful act of the Receiving Party; (iii) is received from a third party free to disclose it to the Receiving Party; (iv) is independently developed by the Receiving Party without using information provided by the Disclosing Party; (v) is communicated to a

third party with the express prior written consent of the Disclosing Party; or (vi) is lawfully required to be disclosed to any Governmental agency or is otherwise required to be disclosed by law, provided that before making such disclosure the Receiving Party shall give the Disclosing Party an adequate opportunity to object or to assure confidential treatment of the information.

In conclusion, signing a non-disclosure agreement is appropriate under most circumstances, but its scope should be well defined and limited as to time and the parties should clearly understand their respective obligations under the terms of the agreement.

If you have any questions regarding this subject, the points of contact in the Legal Office are John Metcalf, DSN 654-2229 and Patrick Terranova, DSN 992-3210.

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